

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

+ **CM(M) 181/2015 and CM No. 4063/2015 (Stay)**

% **Reserved on: 20th May 2015**
Decided on: 29th June, 2015

SUMAN KAPOOR Petitioner

Through: Mr. Atul T.N., Advocate.

versus

RAKESH KUMAR Respondent

Through: Mr. Ashok Kr. Nenwani, Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Aggrieved by the order dated 15th November, 2014 whereby the application under Section 151 CPC of the petitioner/plaintiff in suit CS No. 359/2012 titled as 'Suman Kapoor Aka Seema Kapoor vs. Rakesh Kumar' seeking permission to lead additional evidence was declined, the petitioner prefers the present petition. Vide the impugned order Learned Additional District Judge held that issues in the suit were settled on 19th March, 2008, the parties had already led their evidence and the matter was listed for final arguments when the application was filed by the petitioner/plaintiff seeking permission to lead additional evidence. The reason assigned for permission to lead additional evidence was that since the defendant has raised controversy about the documents Ex.PW1/2 to PW1/4, hence, the opinion of the handwriting expert was necessary. The learned Additional District Judge held that it was not the case of the petitioner/plaintiff that she was not aware of the defence raised by the defendant at the time of leading her evidence or cross examining the defendant's witness. Thus, the application was dismissed with the cost of Rs. 5,000/-.

2. Learned counsel for the petitioner states that in the suit the petitioner/plaintiff has relied upon the documents which were duly signed by the defendant i.e. Ex.PW1/2 to Ex. PW1/4. Since in cross examination the defendant did not admit these documents, the petitioner/plaintiff is required to prove the same by leading additional evidence. Learned counsel for the petitioner relies upon the decision of this Court in Subash Chander Vs. Bagwan Yadav 2010 VI AD Delhi 96 to contend that the Court even has *suo moto* power to call additional evidence or expert evidence. Once the attesting witness denies having witnessed the documents the same cannot be proved under Section 73 of the Indian Evidence Act, however, this proposition does not relate to a case where the executant of the document denies the signature. The suit for specific performance filed by the petitioner/plaintiff is based upon these documents only and in case the same are not permitted to be proved by leading additional evidence, serious prejudice would be caused to the petitioner/plaintiff. The Court is even empowered to direct commission for scientific evidence under Order XXVI Rule 10(b) CPC. Only after the witness denies executing the documents, the petitioner/plaintiff was required to prove the same.

3. Learned counsel for the respondent contends that the onus to prove his case was on the petitioner/ plaintiff and having led his entire evidence, he cannot now seek permission to lead additional evidence.

4. Heard learned counsel for the parties.

5. Order XVIII CPC provides the manner in which evidence has to be held by the parties as under:

“1. Right to begin-The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff

and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

2. Statement and production of evidence.-(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(3A) Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.

(3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

(3D) The Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.

3. Evidence where several issues.- Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option,

either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produce by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

6. Perusal of the Rule 1, 2 and 3 of Order XVIII CPC would show that the plaintiff has a right to begin unless defendant admits the fact, hence state his case and produce his evidence in support of the issues which he is bound to prove. Under Rule 3 out of the several issues if the burden to prove some issue lies on other party, then the party can begin at his option, either produce his evidence on these issues or reserve it by way of answer to the evidence produced by the other party and in the latter case, the party beginning may produce the evidence. However, there is no provision in the CPC which permits the party to lead evidence later on even on an issue onus of which lies on it.

7. A Division Bench of Punjab & Haryana High Court deciding a reference on this point in Surjit Singh & Ors. Vs. Jagtar Singh and Ors. Vol 145 2007 (1) PLR 552 held as under:

“21. In our opinion, Order 18, Rule 3 of the CPC would not give a right to the plaintiff to lead evidence in rebuttal on issues in which the onus of proof is on the plaintiff. Accepting such an interpretation would be to ignore a vital part of Order 18, Rule 3 of the CPC. The rule clearly postulates that "the party beginning, may, at his option, either produce his evidence on these issues or reserve it by way of answer to the evidence produced by the other parties". No matter, how liberally a provision in

the statute is required to be interpreted, by interpretation it cannot be amended. Whilst construing a statutory provision the court cannot reconstruct it. The rule consciously provides the parties with an option either to produce the evidence in support of the issues or to reserve it by making a statement to that effect. The statement itself may well be liberally construed to avoid any unnecessary technical obstacles. One such example has been given by the Division Bench in the case of Smt. Jaswant Kaur (supra). It has been held that if a statement is made by the Advocate for the plaintiff that "the plaintiff closes its evidence in the affirmative only", the same would be read to mean that the plaintiff had reserved its right to lead evidence in rebuttal. We are, therefore, unable to agree with the observations made by the learned single Judge in the case of Kashmir Kaur (supra) that he is entitled to lead evidence in rebuttal as a matter of right. In our opinion, this observation runs contrary to the observations of the Division Bench in Jaswant Kaur's case (supra). The Division Bench has even fixed the maximum time on which the plaintiff has to exercise his option to reserve the right to lead evidence in rebuttal. It has been clearly held that such a reservation has to be made at the time of the close of the evidence of the plaintiff. We are also unable to agree with the observations of the learned single Judge in the case of Punjab Steel Corporation (supra). In that case the plaintiff sought to lead evidence in rebuttal, after the close of the evidence of the defence. At that stage, the plaintiff cannot be permitted to reserve the right to lead evidence in rebuttal. The observations of the learned single Judge run contrary to the law laid down by the Division Bench in the case of Smt. Jaswant Kaur (supra). No doubt, the Division Bench clearly lays down that an overly strict view cannot be taken about the modality of reserving the right of rebuttal. But at the same time, it has been held that the last stage for exercising option to reserve the right of rebuttal can well be before the other party begins its evidence. We are in respectful agreement with the aforesaid

observations of the Division Bench in the case of Jaswant Kaur (supra) and R.N. Mittal, J. in National Fertilizers Ltd. (supra).”

8. This Court in *Subash Chander* (supra) has held as under:

“10. The next question which arises is that if the document is so placed on the court file, whether it becomes / is to be treated as the document of the party producing the same and is that party entitled to prove the said document notwithstanding having not filed the same earlier, as required by law, or the use of the said document is to be confined only to confront the witness to whom it was put and it cannot be permitted to be proved by that party in its own evidence.

11. The legislative intent behind order 7 Rule 14(4) and Order 8 Rule 1A(4) and Order 13 Rule 1(3) appears to be to permit an element of surprise, which is very important in the cross examination of witnesses. A litigant may well be of the opinion that if the document on the basis whereof he seeks to demolish the case of the adversary is filed on the court record alongwith pleadings or before framing of issues, with resultant knowledge to the adversary, the adversary may come prepared with his replies thereto. On the contrary, if permitted to show/produce the document owing to element of surprise, the adversary or witness, may blurt out the truth. Once it is held that a litigant is entitled to such right, in my view it would be too harsh to make the same subject to the condition that the litigant would thereafter be deprived of the right to prove the said documents himself. Thus, if the witness to whom the document is put in cross examination fails to admit the document, the party so putting the document, in its own evidence would be entitled to prove the same. However, the same should not be understood as laying down that such party for the said reason and to prove the said document would be entitled to lead evidence which otherwise it is not

entitled to as per scheme for CPC and evidence law. For instance, if the document is shown by the defendant to the plaintiff's witness and the plaintiff's witness denies the same, the defendant can prove the document in his own evidence. Conversely, if the plaintiff puts the document to the defendant's witness and the defendant's witness denies the same, the plaintiff is entitled to lead rebuttal evidence would in his rebuttal evidence be entitled to prove the same. However, if the plaintiff has no right of rebuttal evidence in a particular case, the plaintiff would not be entitled to another chance to prove the document. In such a case, the plaintiff has to make a choice of either relying upon the surprise element in showing the document or to file the document along with its pleadings and/or before the settlement of issues and to prove the same. Similarly, if the defendant chooses to confront the document to the plaintiff's witness in rebuttal, merely because the witness denies the document would not entitle the defendant to a chance to prove the document subsequently.

12. I may however, put a line of caution over here. It is often found that a party which has otherwise failed to file documents at the appropriate stage, attempts to smuggle in the documents in the evidence of the witness of the adversary by putting the documents to the witness whether relevant to that witness or not. The court should be cautious in this regard. Only those documents with which the witness is concerned and expected to know or answer ought to be permitted to be put to the witness in the cross examination. If other documents with which the witness is not concerned are confronted only in an attempt to have the same filed and to thereafter prove the same, the court would be justified in clarifying that the document is taken on record only for the purpose of cross examination and the producing party would not be entitled to otherwise prove the same, having not filed it at the appropriate stage."

9. The decision of this Court in *Subhash Chander (supra)* applies to a case where as an element of surprise the plaintiff wants to confront the defendant witness with some documents and reserves his right to lead evidence in rebuttal by leading evidence in affirmative, in which case the plaintiff would be at liberty to lead rebuttal evidence and prove the said documents.

10. In the present case vide order dated 19th March, 2008 the learned Additional District Judge settled the following issues:

“1. Whether the suit of the plaintiff is barred by law of limitation?(OPD)

2. Whether the time was the essence of the contract of sale of the suit property? If so, its effect? (OPD)

3. Whether the plaintiff was ready and willing to perform her part of the contract regarding which the specific performance has been claimed?(OPP)

4. Whether the plaintiff is entitled to the decree for a specific performance or in the alternative for the recovery of the amount as prayed for with interest, its period and quantum?(OPP)

5. Relief.”

11. From the pleadings and the issues settled, it is clear that onus to prove the agreement to sell was on the petitioner/plaintiff and in this regard he exhibited the documents i.e. receipt Ex. PW-1/2 dated 24th May, 2002, Ex. PW-1/3 receipt dated 21st July 2002, Ex. PW 1/4 receipt dated 16th August, 2002 and carbon copy of the legal notice dated 29th August, 2006 as Ex. PW1/5 which are the bone of contents. The documents have already been

exhibited by the petitioner. The defendant/respondent however in cross examination on confrontation by the petitioner/plaintiff denied his signatures. This fact was aware to the petitioner/plaintiff for the reason that the stand of the respondent in the written statement was that the agreement remained unconcluded as the plaintiff failed to perform her part of the agreement and was neither ready nor willing to pay the balance of consideration by 25th June, 2002, time being the essence of the contract. Though the defendant admitted having been executed receipt dated 24th May, 2002 Ex. PW 1/1 however signatures on the rest of the documents i.e. Ex.PW1/2 to PW1/4 were denied. There is no element of surprise in the stand of the respondent as in the written statement he clearly stated that part sale consideration of Rs. 50,000/- was received vide receipt dated 24th May, 2002 and the rest of the receipts, if any, were forged and fabricated.

12. In the present case the onus to prove the documents Ex.PW1/2 to Ex.PW1/5 was on the petitioner/plaintiff, the respondent/defendant having denied executing these documents and thus there was no element of surprise. After the entire trial is over, the petitioner cannot be permitted to seek expert opinion and lead additional evidence.

13. There is no merit in the petition. The petition and the application are dismissed.

(MUKTA GUPTA)
JUDGE

JUNE 29, 2015
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