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

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Date of Decision: 30.08.2016

+ CM(M) 842/2016 & CM Nos.31530-531/2016

MAHARAJ I S WAHI

..... Petitioner

Through Mr.Akshay Makhija, Ms.Mahima
Bahl & Mr.Shivi Sanyam, Advocates

versus

RENUKA WAHI

..... Respondent

Through Mr.Vikas Tiwari, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

CM No. 31531/2016 (*exemption*)

Allowed subject to all just exceptions.

CM(M) 842/2016 & CM No. 31530/2016 (*stay*)

1. By the present petition, the petitioner seeks to impugn the order dated 06.08.2016 by which the request of the petitioner/plaintiff to lead rebuttal evidence has been declined.
2. The parties are husband and wife. The petitioner/plaintiff has filed a suit seeking declaration that he is the absolute owner of the suit property bearing No.N-15, South Avenue, Sainik Farm, New Delhi.
3. It is the contention of the petitioner that on the request of the

respondent, a property was purchased by the petitioner in the name of the respondent though the entire money was paid by the petitioner. The arrangement between them was that the petitioner would be the true owner of the said property although the whole family could use the same.

4. The issues were framed on 18.07.2011. The relevant issue on which the petitioner/plaintiff relies upon is issue 5A, which reads as follows:

“Issue 5A: Whether the plaint does not disclose any cause of action? OPD”

5. The trial court noted that there are three issues the onus of which lies on the respondent. Two of the issues, namely, whether the suit is not maintainable under Section 34 of the Specific Relief Act and whether the suit is hit by the provisions of the Delhi Land Reforms Act, were legal issues. On issue 5A the trial court noted that the petitioner seeks to prove e-mails that had been exchanged between the respondent and the only son of the parties. The respondent in her cross-examination has denied these emails. The trial court also noted that rebuttal evidence has to be limited to rebuttal of facts brought out by the defendant in her defence. The Court held that no facts brought out by the defendant, which the plaintiff/petitioner needs to disprove were brought to the knowledge of the court to justify allowing rebuttal evidence. The trial court concluded that the petitioner cannot reopen his case or evidence in the garb of leading rebuttal evidence. The trial court also noted that there is no statement of the petitioner closing his evidence in the affirmative after his evidence was completed.

6. The learned counsel for the petitioner relies upon the judgment of this Court in *Subhash Chander v. Bhagwan Yadav, 2010 I AD (Delhi) 96*, to

contend that he would be entitled to lead rebuttal evidence and try to prove these emails. He also submits that the said evidence would be necessary to adjudicate upon issue 5A framed by the court.

7. Order XVIII Rule 3 CPC reads as follows:

“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 produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

8. Hence, where there are several issues, the onus of some of which lies on the other party, the party beginning may produce his evidence on those issues after the other party has produced all its evidence.

9. The court in *Subhash Chander v. Bhagwan Yadav*(supra) held as follows:

“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 along with 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 of 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.

10. Admitted fact is that the e-mails were put to the respondent in her cross-examination. She denied about the e-mails exchanged between her and the only son of the parties. As per the law laid down in the above judgment, the petitioner can prove the above documents in rebuttal evidence, provided he has a right to lead rebuttal evidence. The trial court wrongly held that proving these e-mails will amount to re-opening the case of the plaintiff.

11. Another ground to dismiss the request of the petitioner was that the petitioner made no statement seeking liberty to lead rebuttal evidence when

he closed his evidence. A learned Single Judge of this court in ***Wazirpur Small Industries Association (Regd.) v. Union of India & Ors., 2010 IV AD (Delhi) 262*** held as follows:

“3. With due respect to the Single Judge of the Orissa High Court, I consider that where the burden of proving some issues is on the defendant and plaintiff has to start its case, the plaintiff starts leading evidence on the issues on which burden is on the plaintiff. The plaintiff, after closing his evidence on those issues, even if does not tell the Court that he was reserving his right to lead evidence in rebuttal, will have a right to lead evidence in rebuttal after the defendant had led evidence, on those issues where the onus of proving was on the defendant. The right of rebuttal is provided under Order 8 Rule 13 CPC and the Order does not specify that an option is to be given by the plaintiff after its evidence was over. This right has been given irrespective of exercise of the option at that stage. The Court cannot read what is not written in the Statute. The Statute is to be interpreted in a plain manner in which it lays down the law. It is only after defendant’s evidence the plaintiff can decide whether there was necessity of leading evidence in rebuttal or not and at that stage plaintiff can exercise his right of leading evidence in rebuttal.”

12. In view of the above judgment, the plaintiff may after the evidence of the defendant is over, seek to exercise his right under the provisions of Order 18 Rule 3 CPC to lead rebuttal evidence. Failure to intimate that the plaintiff intends to lead rebuttal evidence when the plaintiff closed his evidence will not shut the plaintiff from leading such evidence. The trial court wrongly declined the request of the petitioner to lead rebuttal evidence on this ground.

13. A similar view was stated by another Bench of this court in ***Shri Prem Sagar Gupta (deceased) through LRs v. Respondent: Smt. Kamlesh***

Kumari and Anr., AIR 2004 Delhi 136, where the court held as follows:

“2. The perusal of the impugned order shows that the application of the petitioner for exercising this right was dismissed mainly on the ground that the application has been moved after two months of the closure of the evidence by the defendant. According to the learned ADJ the plaintiff was required to move such an application on that very day when the evidence was closed by the defendant. I am afraid such a view is highly untenable and difficult to accept as for belated application the plaintiff could have been burdened with the cost as it is for such eventuality that cost is deemed as panacea. Rejection of a right of a person to produce evidence in rebuttal on account of delayed application is negation of the right itself. To deny this right on its belated exercise is not only infraction of a legal right but also amounts to defeating the interests of justice.”

14. The trial court also appears to have taken the view that the petitioner/plaintiff before leading rebuttal evidence would have to satisfy the court as to on what facts which have been brought on record by the defendant, he seeks to lead rebuttal evidence. A reading of the Order 18 Rule 3 CPC shows that no such restriction has been placed on the party who lead evidence first.

15. Given the nature of the issue framed, and the evidence that is sought to be brought on record by the petitioner in the light of the above legal position, in my opinion, the petitioner would be entitled to lead rebuttal evidence. The impugned order suffers from material irregularities.

16. In view of the above, the present petition is allowed and the impugned order is quashed. The petitioner is granted one opportunity to lead his rebuttal evidence on the date fixed before the trial court. No adjournment would be granted to the petitioner on that date. The trial court is requested to

record the evidence of the only witness sought to be produced by the petitioner expeditiously. All the pending applications are also disposed of.

JAYANT NATH, J.

AUGUST 30, 2016/v