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

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Date of decision: 02.02.2017

+ CM(M) 124/2017 & CM Nos.4046-4047/2017

AMARJIT SINGH & ANR Petitioners
Through Mr.Rajiv Bahl & Mr.S.P.Srivastava,
Advocates

versus

SURINDER SINGH ARORA & ANR Respondents
Through Mr.S.C.Singhal, Advocate

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

CM No. 4047/2017*(exemption)*

Allowed subject to all just exceptions.

CM(M) No.124/2017 & CM No. 4046/2017*(stay)*

1. By the present petition filed under Article 227 of the Constitution of India, the petitioners seek to impugn the order dated 08.12.2016 whereby his application filed under Section 33 of the Indian Stamp Act was deferred for adjudication to the stage of final disposal of the suit.
2. The controversy centres around two brothers regarding a property situated at Vikas Puri, Delhi.
3. The petitioners tendered their evidence as DW1. However two

documents namely receipt and agreement to sell which were marked as Ex.RW1/2 and RW1/3 respectively in the affidavit by way of evidence were not accepted as exhibits and were marked as Mark-27 and Mark-28 by the local commissioner in order dated 04.01.2016. On 18.05.2016, the petitioners tendered their witness DW1 for cross-examination subject to orders of the concerned court on his application under Section 33 of the Indian Stamp Act and Section 65 of the Evidence Act for leading secondary evidence.

4. The present application is filed by the petitioners under Section 33 of the Indian Stamp Act and Section 65 of the Evidence Act. The bone of contention of the suit is the documents, namely agreement to sell which is marked as Mark-28 and receipt which is marked as Mark-27. By the present application, it is contended that the originals of these two documents are misplaced. Hence, petitioner may be allowed to lead secondary evidence. It is further stated that as there is an objection by the respondents that the said documents are unstamped and unregistered and are only photocopies of the originals, it is urged that the petitioners may be permitted to pay necessary stamp duty and penalty under Section 33 of the Indian Stamp Act and lead secondary evidence under Section 65 of the Evidence Act.

5. By the impugned order the trial court deferred the decision of this application to the stage of final disposal of the suit.

6. I have heard the learned counsel for the parties.

7. The learned counsel appearing for the petitioners relies upon the judgment of this court in *Smt.Shail Kumari v. Smt.Saraswati Devi, 96 (2002) DLT 131* to contend that the legal position settled by this court is that these objections regarding admissibility of documents and mode of proof

have to be decided at the initial stage and not deferred.

8. In this context, a reference may be had to the judgment of this court in the case of *Smt.Shail Kumari v. Smt.Saraswati Devi* (supra). Relevant para 23 of the judgment reads as follows:

“23. The question of admissibility of the document has to be decided at the stage when the document is formally tendered in evidence and proved. Deferring a decision on the question of admissibility of the document and making it part of the evidence by marking exhibit mark on it may lead to complication and in many cases result in grave injustice to the party, who tenders the document. If the question of admissibility of the document and making it part of the evidence by marking exhibit mark on it may lead to complication and in many cases result in grave injustice to the party, who tenders the document. If the question of admissibility of the document is deferred to be decided at the time of hearing of final arguments in many case a party may be deprived of an opportunity to cure a curable defect or supply the deficiency. It is for this very reason that the High Court Rules and Order discussed above lay emphasis on prompt disposal of the objection raised to the admissibility of the document and mode of proof. It may work great injustice in some cases if left undecided till the arguments are heard for disposal of the suit. The objection to the admissibility and the proof of the document should ordinarily be not kept pending and this should be decided promptly as and when they are raised, particularly if raised during the recording of the evidence of a witness who is called to prove it. But the objection certainly be disposed of before the date is fixed for hearing of final arguments. The view taken by this Court finds support from the judgment of a Division Bench of this court reported as *Sunder Bala and Anr. v. Sandeep Foam Industries Pvt. Ltd.* MANU/DE/0848/2000:AIR2000Delhi300:-

"before we part with the judgment we would like to observe that when appellants desired to prove the duplicate copy of the certificate No. 3/68/9364 of the

post office dated 23rd March, 1994 marked as PW 1/9 certifying that the letter sent vide postal receipt No. 4564 dated 13.12.1993 was not received back and was duly delivered, the method and manner of proof was objected to by learned Counsel for the defendant/respondent. The objection was not decided by the Trial Court immediately. The objection with regard to the proof of such vital documents could not and ought not to have been kept pending. Had the objection been decided by the Trial Court at an early stage of the proceedings, the plaintiff-appellant might have taken recourse to remedial measures for proving the said document in accordance with law. Even appellants did not ask that the objection with regard to proof be decided in the first instance. Keeping the objections pending and deciding the same only at the time of delivering final judgment, was not appropriate. Such a practice has to be depreciated.”

9. Similarly, in *Surender Bala & Anr. v. M/s.Sandeep Foam Industries P.Ltd.*, 85 (2000) DLT 478 (DB), the Division Bench of this court held as follows:

“17. Before we part with the judgment we would like to observe that when appellants desired to prove the duplicate copy of the certificate No. 3/68/9394 of the post office dated 23rd March, 1994 marked as PW-1/9 certifying that the letter sent vide postal receipt No. 4564 dated 13.12.93 was not received back and was duly delivered, the method and manner of proof was objected to by learned counsel for the defendant/respondent. The objection was not decided by the trial court immediately. The objection with regard to the proof of such vital documents could not and ought not to have been kept pending. Had the objection been decided by the trial court at an early stage of the proceedings, the plaintiff appellant might have taken recourse to remedial measures for proving the said document in accordance with law. Even appellants did not ask that the objection with regard to proof be decided in the first instance. Keeping the objections pending and deciding the

same only at the time of delivering final judgment, was not appropriate. Such a practice has to be depreciated.”

10. In the light of the above legal position as settled by this court, the trial court fell into material error in deferring the adjudication of the application to be taken up alongwith final disposal of the suit. Accordingly, I quash the order dated 08.12.2016. The trial court is directed to adjudicate upon the said application filed by the petitioners at this stage itself.

11. As far as the other direction sought by the petitioners in their application, namely seeking permission to lead secondary evidence is concerned, the legal position in this regard is no longer res- integra.

12. This Court in CM(M) 789/2016 titled Pawan Kataria vs. Ardeep Kumar Batta and Anr in its order dated 24.8.2016 held as follows:-

“11.Hence, where the original documents are not produced, a factual foundation has to be laid for giving secondary evidence while leading evidence. In the absence of a factual foundation the secondary evidence would be inadmissible. There is an obligation on the court to decide on the question of admissibility of document as secondary evidence before making an endorsement thereon the document.

12.In the present case without leading any evidence the petitioner has filed an application under section 63 of the Indian Evidence Act for permission to lead secondary evidence. As already noted above by this court in ***Mangat Ram vs. Ashok Kumar Sharma (supra)*** the application is neither necessary nor warranted. The petitioner had to lead his evidence including evidence to lay the foundation to permit the court to appreciate as to whether the secondary evidence can be admitted as evidence. The question of admissibility of a document would have to be gone into before making an endorsement, as noted in the above judgments.”

13. Hence, this court relying upon judgments of the Supreme Court in *U.Sree vs. U.Srinivas, (2013) 2 SCC 114* and *H.Siddiqui (dead) by LRs vs. A.Ramalingam, AIR 2011 SC 1492* concluded that it is for the party to lay a factual foundation for giving secondary evidence. In the absence of a factual foundation the secondary evidence is inadmissible. There is an obligation on the court to decide the question of admissibility of documents as secondary evidence before making an endorsement thereon on the documents.

14. In the present case hence the request of the petitioner to lead secondary evidence was misplaced. The petitioner is free to take steps to lead his secondary evidence as per the legal position stated.

15. With the above directions, the present petition and all the pending applications stand allowed.

16. A copy of this order be given *dasti* under the signature of the court master to the parties.

JAYANT NATH, J.

FEBRUARY 02, 2017/v