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

+ CM(M) 733/2016

NARENDER SINGH

..... Petitioner

Through: Mr.Brijesh Johar, Advocate

versus

KANWAL SINGH

..... Respondent

Through: Mr.G.D.Sharma, Advocate

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

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08.05.2017

CM(M) 733/2016

1. By invoking the jurisdiction of this Court under Article 227 of the Constitution of India, petitioner has made the following prayers:-

(a) To set aside the impugned order dated 15th January, 2016 passed in the application under Section 151 CPC whereby the said application of the petitioner under Section 151 CPC was dismissed;

(b) To set aside the impugned order dated 17th March, 2016 passed in the application under Order XLVII Rule 1 read with Section 114 and 151 CPC whereby the said application was dismissed;

(c) To set aside the impugned order dated 27th April, 2016 whereby the evidence of the petitioner is closed by the Court of Dr.Shahbuddin, ADJ-II (North West), Rohini, Delhi in Civil Suit No.570/2013.

2. Learned counsel for the petitioner has drawn the attention of this

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Court to the list of documents filed on 31st May, 2011 wherein photocopy of the affidavit dated 20th October, 2005 is mentioned at serial number 4. Not only that, he has also drawn the attention of this Court to the affidavit and the stamp bearing the date of the filing of document by the learned trial Court on the reverse side of the affidavit which is sufficient to show that it was filed on 31st May, 2011. It has been submitted that despite the photocopy of the affidavit being filed at appropriate stage, the original affidavit has not been allowed to be placed on record.

3. The limited submission made by the learned counsel for the petitioner is that the petitioner may be permitted to place on record the original affidavit in respect of which objection about mode of proof has already been taken by the learned counsel for the respondent herein.

4. Learned counsel for the respondent submits that the original affidavit was not placed on record at the appropriate stage. Even during cross-examination of the plaintiff, the affidavit was not confronted to the PW-1, the plaintiff. As the plaintiff's evidence has been closed, the petitioner/defendant cannot be permitted to bring the original affidavit on record.

5. It is admitted case of the parties that the photocopy of the affidavit has been placed on record along with list of documents on 31st May, 2011. When the defendant/DW-1 Sh.Narender Singh tendered his evidence by way of affidavit, his examination was recorded as under:-

“Statement of DW-1, Sh. Narender Singh S/o Sh.Hanumant Singh, aged about 45 years, R/o 4th Floor, 460/1, Rama Market, Pitampura, Delhi-34.

On S.A.

I tender my evidence by way of affidavit, which is Ex.DW-1/A, bearing my signatures at point A & B. I reply upon the documents i.e. site plan, as Ex.PW-1/1, copy of sale

deed dt.24.10.2005, which has been exhibited in the affidavit but in absence of original the same is de-exhibited and mark as X-1, copy of affidavit/NOC dt.20.10.2005, as Ex.PW-1/3 (OSR) (objected by Ld.Counsel for plaintiff) and photocopy of sale deed dt.18.11.2005 is marked as mark A.

Further examination in chief is deferred at the request of Ld.Px.Counsel Sh.Tej Pal Sokeen, on the ground that the original of Ex.PW-1/3 has been traced by the defendant today only and that defendant wants to file the same in original on judicial record by filing an application to this effect on or before the next date of hearing.

RO&AC

Sd/-

ADJ-II (N/W):Rohini:

Delhi: 22.09.15”

6. Thereafter, the petitioner filed an application under Section 151 CPC which has been dismissed by the learned trial Court vide order dated 15th January, 2016 declining the permission to place on record the original document on the ground that it would amount to filling up the lacuna.

7. The application seeking review of the said order has also been dismissed on 17th March, 2016. Thereafter when the case was listed for defendant's evidence, the petitioner/defendant sought adjournment on the ground that the petition filed by him before High Court is pending. However, as there was no stay order passed by the High Court, learned trial Court closed the defendant's evidence.

8. In view of the filing of the photocopy of the affidavit of the plaintiff way back on 31st May, 2011, the respondent/plaintiff cannot contend that he was taken by surprise or that the document was manufactured. The purpose of filing the document before the parties are called upon to lead their evidence, is to prevent the litigants from manufacturing the evidence pending trial and also to ensure that the opposite party is not taken by

surprise. The nature of the document which are above suspicion and the other party is not taken by surprise should not be excluded if they are necessary for proper decision of the suit.

9. In the instant case the affidavit dated 20th October, 2005 was filed well in time and in the absence of original document the photocopy could not be exhibited during examination in chief of DW-1 Sh. Narender Singh. Since the petitioner herein wanted to place on record the original affidavit dated 20th October, 2005 and for that purpose he had filed an application under Section 151 CPC which has been dismissed by the learned trial Court mainly for the reason that it will amount to fill up the lacuna left in the case of defendant. When the case is at the stage of defendant's evidence the defendant could place the original document on record, photocopy of which has already been filed. Production of the original document, the photocopy of which has already been filed, was not having the effect of filling up the lacuna as noted by the learned trial Court. After the document was tendered in evidence, the respondent/plaintiff could have ample opportunity to cross-examine the DW-1.

10. In view of the above discussion, the order impugned herein is set aside and one opportunity is granted to the petitioner/defendant to tender the original affidavit dated 20th October, 2005 in evidence as well tender himself for cross-examination by the respondent/plaintiff subject to costs of ₹25,000/- which shall be payable on or before the next date of hearing before the learned trial Court.

11. It is informed by the learned counsel for the parties that the matter is listed before the learned trial Court on 5th July, 2017.

12. On the next date of hearing before the learned trial Court the

petitioner shall appear and tender the original affidavit of Mr.Kamal Singh dated 20th October, 2005 (photocopy of which has been filed on 31st May, 2011).

13. It is made clear that if the cost is not paid on or before 5th July, 2017 and the witness DW-1 failed to appear for his examination and cross-examination, this petition shall stand dismissed. However, if for some reason the learned Presiding Officer happens to be on leave, in that case only for the purpose of examination of DW-1 another date shall be fixed provided that costs stands paid by that date.

14. The petition stands disposed of in above terms.

15. Copy of the order be given *dasti*.

CM No.27622/2016

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 08, 2017

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