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

+ CM(M) 616/2017

ZAID AHMED

..... Petitioner

Through: Mr.Rajesh Luthra, Advocate.

versus

MOHD AHMED

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

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26.05.2017

CM No.20700/2017 & 20701/2017

1. Exemption allowed subject to all just exceptions.
2. Application are disposed of.

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1. By invoking the jurisdiction of this Court under Article 227 of the Constitution of India, the petitioner/plaintiff is praying for setting aside the order dated 5th May, 2017 whereby the learned Trial Court declined the permission to lead evidence in rebuttal and examine Mohd.Shakib, son of Kamaluddin, who was witness to the sale transaction.
2. Learned counsel for the petitioner has submitted that the petitioner/plaintiff closed the evidence in affirmative reserving his right to lead evidence in rebuttal. Despite that, opportunity has been denied to the petitioner/plaintiff to lead evidence in rebuttal. It has also been submitted

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that the learned Trial Court could not exercise the discretion even under Section 151 of Code of Civil Procedure by permitting the petitioner to lead evidence even after closing of the defence evidence. Learned counsel for the petitioner has relied upon K.K.Velusamy vs. N.Palanisamy (2011) 11 SCC 275 in support of his contentions.

3. Civil Suit No.95509/16 (Old No.328/16) has been filed by petitioner/plaintiff Sh.Zaid Ahmed against his father Mohd.Ahmed – respondent/defendant for specific performance of the agreement in respect of property bearing Shop No.3605, Bara Hindu Rao, Delhi-110006.

4. Vide impugned order, the learned Trial Court refused the permission to the petitioner to examine Mohd.Shakib for the following reasons:-

(a) The issues settled in this case on 14th July, 2004 are:-

(i) Whether the present suit of the plaintiff is barred by limitation? OPD

(ii) Whether the defendant have executed Receipt-cum-Agreement dated 14.3.1980? OPP

(iii) Whether the plaintiff is entitled for decree as claimed for? OPP

(b) The onus to prove issue No.1 was on the defendant which was on the aspect of limitation and rebuttal could have been only in respect of issue No.1.

(c) Mohd.Shakib, son of Sh.Kamaluddin is being sought to be examined claiming that Kamaluddin was witness to the transaction between the parties i.e. father and the son.

(d) The trial has come to an end. Final arguments on behalf of defendant have already been heard giving liberty to the petitioner/plaintiff to file written submissions.

5. It is the case of the petitioner that suit for specific performance was filed in the year 2003 in respect of suit property in respect of which a receipt-cum-agreement dated 14th March, 1980 was issued by the respondent/defendant, who is father of the petitioner. The said receipt-cum-agreement has been annexed with this petition as Annexure-P2. The photocopy of the receipt-cum-agreement Annexure-P2 is undated and the place meant for signature by witness has been left blank.

6. It is petitioner's own case that the evidence by the petitioner was closed in the year 2013 i.e. after ten years of institution of the suit and defendant's evidence was closed on 20th October, 2016. Thus, during this period of 2013 to 2016 when the case was still at the stage of evidence, no prayer was made by the petitioner to examine any other witness including that of Kamaluddin. In the application under Order XVIII Rule 2 and 17 read with Section 151 of Code of Civil Procedure, it is nowhere mentioned that Kamaluddin was cited as a witness or at any point of time, summons sent to this witness returned with the report that he has expired or not traceable. If Kamaluddin was a witness to the transaction, in the absence of signature of the witness on the said receipt-cum-agreement, the examination of Mohd.Shakib, son of Kamaluddin is of hardly any relevance. Learned Trial Court has rightly held that the onus to prove only issue No.2 was on the plaintiff on which he has already led the evidence. There was no question of giving him any opportunity to lead evidence in rebuttal especially when the case is ripe for judgment.

7. Reliance placed on K.K.Velusamy vs. N.Palanisamy (Supra) by learned counsel for the petitioner does not come to the rescue of the petitioner. No doubt, the Apex Court has held that in the absence of any

provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the Court, the inherent power under Section 151, subject to its limitation, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. If there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the Court may in exercise of its inherent power under Section 151, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the Court may deem fit to impose.

8. In the above decision, a caution has also been added in para 19 of the report as under:-

'19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.'

9. The case of the petitioner does not fall in the category where the learned Trial Court was required to exercise the discretion under Section 151 CPC or under Order XVIII Rule 17 CPC.

10. The impugned order does not suffer from any illegality or infirmity so as to warrant interference by this Court under Article 227 of the Constitution of India.

11. The petition is dismissed.

CM No.20699/2017

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 26, 2017

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