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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 624/2017 & CM No.21077/2017 (for stay)
RAMAKANT KAUSHIK & ANR Petitioners
Through: Mr. Prashant Sharma & Mr. Shubneet
Kumar, Advs.

Versus

PAWAN SHARMA Respondent
Through: Mr. Vikrant Mittal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **15.09.2017**

1. This petition under Article 227 of the Constitution of India impugns the order [dated 30th March, 2017 in Civil Suit No.5182/2015 of the Court of JSCC/ASCJ/G. Judge (North-East), Karkardooma Courts, Delhi] allowing the application of the respondent / plaintiff under Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (CPC).
2. The petition was entertained and notice thereof ordered to be issued.
3. The counsels have been heard.
4. The respondent / plaintiff instituted the suit, from which this petition arises, for recovery of Rs.2,83,901/- from the defendant. The suit was decreed for Rs.2,62,500/- with interest. The petitioner / defendant filed First Appeal against the said judgment and decree and which was disposed of vide order dated 28th July, 2016 by permitting the petitioner / defendant to prove the factum of payment in support of his defence. The petitioner / defendant, pursuant to remand, has led such evidence.

5. The order dated 28th July, 2016 merely directed that the respondent / plaintiff shall be granted opportunity to cross-examine the witness to be so produced by the petitioner / defendant but surprisingly, did not give any opportunity to the respondent / plaintiff to lead evidence in rebuttal to the additional evidence which the petitioner / defendant was permitted to lead.
6. The same necessitated filing of the application by the respondent / plaintiff under Order XVIII Rule 17 and which has been allowed.
7. The additional evidence led by the petitioner / defendant is of a payment made to the respondent / plaintiff from the account of M/s D.S. Foundry, a business name of the petitioner / defendant.
8. The respondent / plaintiff filed the application under Order XVIII Rule 17 of the CPC pleading i) that the petitioner / defendant had never set up the defence of payment by M/s D.S. Foundry; ii) that the payment received from M/s D.S. Foundry which had been proved by the petitioner / defendant by way of additional evidence was in fact on account of refund of advance payment made by the respondent / plaintiff to M/s D.S. Foundry; iii) that the said entries were contained in the books of account of the respondent / plaintiff; iv) that owing to the additional evidence led by the petitioner / defendant, it had become necessary for the respondent / plaintiff to prove in rebuttal its dealings with M/s D.S. Foundry.
9. The reasoning given in the impugned order is cogent and no error is found therein.

10. The counsel for the petitioner / defendant argues that the evidence which has been led by the respondent / plaintiff ought to have been led earlier and the respondent / plaintiff cannot be permitted to lead the same in rebuttal to the additional evidence led by the petitioner / defendant.

11. I am unable to agree. The petitioner / defendant having led additional evidence, of payment by M/s D.S. Foundry to the respondent / plaintiff and which payment is sought to be adjusted against the dues claimed in the suit, the respondent / plaintiff is entitled to explain the said payment received from the petitioner / defendant.

12. The counsel for the petitioner / defendant has referred to ***Lal Chand Ram Krishan Vs. Rajesh Thakur*** AIR 2006 HP 61, ***Vadiraj Naggappa Vernekar Vs. Sharad Chand Prabhakar Gogate*** AIR 2009 SC 1604 and ***Bagai Construction Vs. Gupta Building Material Store*** AIR 2013 SC 1849.

13. What the judgments aforesaid hold is that under Order XVIII Rule 17, the lacunae in evidence cannot be permitted to be filled up.

14. However the present is not such a case. Here, the permission impugning which this petition has been filed has been granted to the respondent / plaintiff is to lead evidence in rebuttal to the additional evidence which the petitioner / defendant has led. In fact, the case is squarely covered by ***K.K. Velusamy Vs. N. Palanisamy*** (2011) II SCC 275 handed over by the counsel for the respondent / plaintiff and falls within the class of cases in which Order XVIII Rule 17 is to be allowed.

15. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 15, 2017

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