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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 1119/2017 & CM No.36442/2017 (for stay).
SCINDIA POTTERIES & SERVICES PVT LTD Petitioner
Through: Mr. Abhishek Singh, Mr. Prithvi
Sidhu and Ms. Saloni Sharma, Advs.
versus
SCINDIA INVESTMENT PVT LTD Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **11.10.2017**

CM No.36443/2017 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

CM(M) 1119/2017 & CM No.36442/2017 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order (dated 7th July, 2017 in Suit No.9096/16 of the Court of Additional District Judge-05, South District, Saket Courts, New Delhi) allowing the application filed by the respondent / plaintiff under Section 65 of the Indian Evidence Act, 1872.
4. The grievance of the petitioner / defendant is that though the petitioner / defendant cited the dicta of this Court in ***Prem Chandra Jain Vs. Sri Ram*** 2009 SCC OnLine Del 3202 holding that an application under Section 65 of the Indian Evidence Act is misconceived but the learned Additional District Judge ignoring the said judgment has proceeded to grant permission to the respondent / plaintiff to lead secondary evidence to prove letters dated 5th October, 1989 and 7th February, 1990.

5. The counsel for the petitioner / defendant, on enquiry states that the suit, at the stage of filing of the application aforesaid by the respondent / plaintiff, was at the stage of respondent / plaintiff's evidence and is listed next now on 13th October, 2017.

6. A perusal of the impugned order dated 7th July, 2017 does indeed show the learned Additional District Judge to have brushed aside the judgment supra merely by observing as under:-

“Further I find that judgments relied upon by the learned counsel for the defendant are of no assistance to the defendant in the facts and circumstances of the present case.”

7. No further reason has been given for not following the ratio in **Prem Chandra Jain** supra holding that the Court, on an application seeking permission to lead secondary evidence, cannot take a decision on the correctness of the reasons and the party seeking to prove document by secondary evidence is to lead evidence of existence of circumstances / situations in which secondary evidence is permissible, during leading its evidence and it will be decided at the stage of disposal of suit only, whether case for leading secondary evidence was made out or not and whether the document stands proved by secondary evidence. The learned Additional District Judge has by this conduct indeed paid scant regard to the principle of precedent with which he is bound.

8. Merely because the respondent / plaintiff filed photocopies of the letters along with the plaint or because the department to which the originals of the letters were claimed to be sent claimed its records to be lost / destroyed or because the witness of the respondent / plaintiff deposed the

respondent / plaintiff having so sent the original letters did not allow the learned ADJ to at the stage of application hold that “There is no ground to doubt or to raise question on admissibility of these documents in evidence” or to hold that “the plea of defendant that very existence of aforesaid letters is in doubt is baseless”. The learned ADJ has committed the fault of adjudicating factual controversy on application and which procedure in the said judgment was held to be not permissible. A copy of this order along with a copy of the impugned order be forwarded to the Committee of the Inspecting Judges of the learned Additional District Judge as well as to the learned ADJ.

9. I have however considered, whether to interdict with the proceedings in the suit listed next on 13th October, 2017. The petitioner / defendant also has approached this Court just a few days prior to the next date before the Suit court and issuing notice of the petition will necessarily result in stay of proceedings in the suit stated to be listed next on 13th October, 2017.

10. With the changing times the Court has to evolve new methodologies to expedite the disposal of litigations. I proceed to deal with the matter in this context.

11. The learned Additional District Judge, in the impugned order, at internal page 8 of the impugned order has also observed / held as under:-

*“After going through the reply to the RTI applications made by plaintiff and statement of witnesses in this case examined by the plaintiff **this court prima facie find** that the aforesaid original documents / letters sought to be produced before the court are untraceable.”*

[emphasis added)

12. However thereafter, the learned Additional District Judge has in the last paragraph of the impugned order, held as under:-

“Since original letters dated 10.05.1989 (sic for 5.10.1989) and 07.02.1990 written by the plaintiff to the deptt. of Mines and Queries are not traceable despite best efforts of plaintiff and plaintiff has relied on these documents in his plaint and photocopies of the same were filed alongwith the plaint, hence, aforesaid letters may be proved by secondary evidence. Plaintiff is entitled to permission as sought by way of present application. Hence, present application is allowed. Plaintiff is granted permission to lead secondary evidence in order to prove aforesaid letters dated 05.10.1989 and 07.02.1990.”

13. Rather than issuing notice of the petition to the respondent / plaintiff a better course appears to be to clarify the order impugned.

14. It is clarified that the observations of the learned Additional District Judge that “Since original letters dated 10.05.1989 (sic for 5.10.1989) and 07.02.1990 written by the plaintiff to the deptt. of Mines and Queries are not traceable despite best efforts of plaintiff” and elsewhere in the impugned order shall be treated as a *prima facie* finding of the learned Additional District Judge and no weightage shall be given to the said observations at the time of appreciation of the evidence at the stage of final arguments in the suit and only if the respondent / plaintiff proves the existence of the letters dated 05.10.1989 and 07.02.1990 and of the original of the same being not available for reasons mentioned in Section 65 and the same being proved by secondary evidence would the said letters be read in the suit.

15. With the aforesaid clarification, the petition is disposed of.

16. Liberty is granted to the respondent / plaintiff, if has anything to address qua this order, to apply to the Court after serving advance copy to the counsel for the petitioner / defendant.

Dasti under signatures of Court Master.

RAJIV SAHAI ENDLAW, J

OCTOBER 11, 2017

‘pp’..