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

+ **CM(M) 1141/2017**

SHARMISTHA SANYAL & ANR Petitioners

Through: Mr. Lohit Ganguly, Advocate

Versus

SUJIT SEN Respondent

Through: Mr. S Chakraborty with Ms. Harshita
Verma, Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **16.10.2017**

CM Nos. 37079/2017 & 37080/2017

1. Allowed, subject to all just exceptions.
2. The applications stand disposed of.

CM(M) 1141/2017 & CM No. 37081/2017

3. This petition under Article 227 of the Constitution of India impugns the order [dated 13th July, 2017 in Case No. 10203/16 (Old CS No.539/2016) of the Court of Additional District Judge-04, South-East, Saket Court, New Delhi] appointing a Commissioner at the cost of Rs. 2,000/- per hour for recording the evidence in the suit as well as the order dated 16th August, 2017 dismissing the application of the petitioners/defendants for review of the said order.
4. Attention of the Additional District Judge is drawn to the dicta of this Court in *H. Dohil Constructions Co. (P) Ltd. Vs. Rohit Lal* AIR 2014 Del 195 and to my order dated 22nd September, 2017 in CM(M) No.1061/2017

titled '*Jiya Sahgal & Anr. Vs. Ashwin Sahgal*' holding that the evidence cannot be ordered to be recorded on commission without the consent of the parties and the cost thereof cannot be imposed on the parties against their consent.

5. The counsel for the respondent appears on advance notice.

6. I have inquired from the counsel for the respondent/plaintiff, whether the respondent/plaintiff is willing to bear the entire cost of evidence, subject to the said cost being made recoverable from the petitioners/defendants in the event of the suit of the respondent/plaintiff being decreed in his favour.

7. The counsel for the respondent/plaintiff states that he will have to obtain instructions. It is also stated that the cost imposed by the learned Additional District Judge is exorbitant and there may be other Advocates willing to be appointed as Commissioner to record the evidence for a lesser fee.

8. On enquiry, it is stated that the petitioners/defendants have filed a list of witnesses.

9. Rather than adjourning the hearing of this petition, to enable the counsel for the respondent/plaintiff to obtain instructions, it is deemed appropriate to dispose of this petition by granting liberty to the respondent/plaintiff to on 30th October, 2017, inform so to the learned Additional District Judge and if the learned Additional District Judge is able to appoint a Commissioner at a lesser cost, the learned Additional District Judge is requested to do so.

10. Else, the order of appointment of Commissioner for recording the evidence would stand set aside and the learned Additional District Judge is requested to fix a date for recording of evidence before the Court.

11. Liberty is also granted to the respondent/plaintiff to contend before the learned Additional District Judge about the relevance of the witnesses sought to be examined by the petitioner/defendant and the learned Additional District Judge is requested to adjudicate on the said aspect also at the appropriate stage.

12. The petition is disposed of with the aforesaid direction.

13. A copy of this order be forwarded to the learned Additional District Judge who is requested to list the suit for the aforesaid purpose on 30th October, 2017 or on such date soon thereafter, if not possible on 30th October, 2017.

RAJIV SAHAI ENDLAW, J

**OCTOBER 16, 2017
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