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

Date of Decision: 14th March, 2018

+ **RFA 219/2017 & CM APPL. 7308/2017 (stay)**

M/S SMC COMTRADE LTD Appellant
Through: Mr. Ravi Ranjan, Advocate.
(M:9971495605)
versus

M/S NARNOLI BULLION & ORS. Respondents
Through: Mr. C. L. Dhawan, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is an appeal against the judgment/order dated 23rd November, 2016 by which the suit of the Appellant/Plaintiff (*hereinafter 'Plaintiff'*) has been dismissed on the ground that repeated applications have been filed and no evidence has been led.
2. The brief history of the matter is that a suit for recovery was filed by the Plaintiff claiming a sum of Rs.14,24,739/- along with interest. It is the case of the Plaintiff that it sold 1 kg gold to the Respondents/Defendants (*hereinafter 'Defendants'*) for a sum of Rs.9,21,462/-. According to the Plaintiff, the Defendant Nos.1, 2 & 3 received the said 1 kg gold on 26th April, 2006 and assured to pay the consideration amount, which was not paid. Hence, the present suit.
3. The suit was registered on 4th November, 2009. Immediately after the pleadings were completed, Plaintiff moved an application under Order XI

Rule 12 CPC seeking the following documents.

- “1) Statement of the account of the defendant firm with effect of 01.04.2006 to 01.04.2009.*
- 2) Ledger/Account Book of the defendant company with effect of 01.04.2006 to 01.04.2009.*
- 3) Income Tax Return of defendant company including statement of profit and loss/balance sheet w.e.f. 01.04.2006 to 01.04.2009.*
- 4) All the correspondence with the parties w.e.f. 01.04.2006 to 01.04.2009.*
- 5) Statement of bank account of the defendant firm w.e.f. 01.04.2006 to 01.04.2009.”*

4. In reply to the said application, the Defendants have categorically refused to disclose the said documents on the ground that M/s. Narnoli Bullion has no connection with M/s. Narnoli Overseas. The said application remained pending for some time. When the matter was listed for Plaintiff's Evidence ('PE') on 18th November, 2011, learned counsel for the Plaintiff submitted that he cannot lead evidence as his application under Order XI Rule 12 CPC was pending. The said application continued to remain pending. On 21st July, 2015 when lawyers were on strike, learned ADJ dismissed the said application for non-prosecution, which ought not to have been done. On 7th October, 2015, a review application was filed seeking review of the order dated 21st July, 2015. An application was also filed seeking substitution of the Authorized Representative ('AR'). The learned ADJ dismissed the review application and the Plaintiff's evidence was closed on the same day on the ground that no evidence was led for 5 years. On 9th March, 2016, the Court also recorded that the statement of AR cannot

be recorded as the new AR is yet to be substituted. On 9th March, 2016, the matter was again adjourned for recording statement on behalf of Plaintiff. Again the application for substitution of AR was pressed on 31st March, 2016 and this went on for the next 2 hearings. An application under Section 340 Cr.P.C. was thereafter filed by the Plaintiff, which was heard on 9th September, 2016. On 27th September, 2016, the substitution of AR was permitted but the matter was listed for Defendants' evidence. Repeated applications were filed for recall of order dated 7th October, 2015. On 23rd November, 2016, the suit itself was dismissed.

5. The manner in which the suit was proceeded with is quite concerning. In the first place, the application under Order XI Rule 12 CPC ought to have been decided which was not done and the same was dismissed on a day when the lawyers were on strike. When an application for recall of the said order was filed, the said application was also dismissed. The application for substitution of AR was repeatedly adjourned but Plaintiff's evidence was also simultaneously closed. The matter was listed for Defendant's evidence repeatedly but the application for substitution of Plaintiff's AR was still pending and being considered. Thus, the suit has been proceeded with in a completely haphazard manner. There is no doubt that the Plaintiff has not pursued the suit with alacrity. However, it could not have led to a circumstance when the suit was dismissed without evidence on behalf of the Plaintiff, when the record shows that on several dates the new Authorised Representative was present along with the Vice Chairman, of the Plaintiff company. Under such circumstances, this Court is of the opinion that an opportunity ought to be granted to the Plaintiff to lead evidence in the matter.

6. Learned counsel for Defendants submits that despite repeated opportunities, the Plaintiff did not led evidence. Under such circumstances, the Plaintiff ought to be put to terms.

Accordingly, the following directions are passed in the matter.

- 1) The Plaintiff is permitted one last opportunity to file its evidence by way of affidavit within two weeks;
 - 2) Plaintiff wishes to file evidence of only two witnesses whose affidavits shall be filed within two weeks. Cross examination of the said witnesses shall take place before the Local Commissioner within two weeks thereafter. The Plaintiff shall not press the application under Order XI Rule 12 CPC;
 - 3) Defendants to file their affidavits in evidence of maximum two witnesses, within two weeks from the date when the cross-examination of Plaintiff's witnesses is concluded. Cross examination of the Defendants' witnesses shall also be conducted before the Local Commissioner within two weeks thereafter.
7. Matter shall be listed for final arguments before the Trial Court on or before 25th May, 2018. The entire expenses of the Local Commissioner shall be borne by the Plaintiff who shall also pay costs of Rs.10,000/- to the Defendants which was imposed by the Trial Court. Mr. S. K. Tandon, retired ADJ is appointed as the Local Commissioner. The learned Local Commissioner shall be paid a lump sum of Rs.50,000/- (Rupees Fifty Thousand Only) as fee for recordal of the evidence. Rs.25,000/- shall be paid when the Plaintiff's witnesses are cross examined and remaining Rs.25,000/- shall be paid upon conclusion of the cross examination of the

Defendants' witnesses. If the time schedule is not adhered with by either of the parties, right to file evidence of the said party shall stand closed. Let the trial court record be sent back.

8. List for directions on 4th April, 2018 before the trial court and for receiving of the affidavits of Plaintiff's witnesses and referring the matter to the Local Commissioner.

9. Appeal along with pending applications is disposed of in the above terms. *Dasti.*

PRATHIBA M. SINGH
Judge

MARCH 14, 2018/dk