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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 1028/2018 & CM APPL. 35609/2018
CREONS INFRASTRUCTURE PVT LTD Petitioner
Through: Mr. Naresh K. Daksh, Adv.

versus

GINY & JONY LTD Respondent
Through: Mr. Amit Prabhat Deshpande, Adv.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER
% **19.12.2018**

Vide the present petition, the petitioner assails the impugned order dated 16.05.2018 of the learned ADJ-03, South-East in CS No.10261/2016 vide which an application under Section 151 of the CPC filed on behalf of the defendant arrayed as the respondent to the present petition seeking a correction in the affidavit of the defense witness examined as DW-1 was allowed with it having been observed to the effect:

“2. In this application, the defendant is seeking correction for certain words in the affidavit filed in evidence by the DW-1. It is stated in the written statement the claim of the plaintiff has been denied as under:

“These defendants deny that consequentially as per understanding the plaintiff submitted its invoices being bill no.06-07/3/0425...”.

3. However, in the affidavit it is written as “I say consequentially as per understanding the plaintiff submitted the invoice being bill no.06-07/3/0245...”.

4. Counsel for the plaintiff argued that there is no provision

seeking amendment in the affidavit/evidence and the amendment can only be allowed in the pleadings as per Order 6 Rule 17 CPC.

5. As per Section 151 r/w Section 153 CPC, a clerical error can be corrected. The counsel for the defendant argued that he came to know about the said error during final arguments.

6. No doubt, the said application has been filed at a very belated stage but keeping in view of the facts that the said sentences has been specifically denied in the written statement and legal notice, I am of the opinion that it was only a clerical error.

7. Counsel for the plaintiff also pointed out that there are other paragraphs in the affidavit as well as in the written statement wherein the claim of the plaintiff has already been admitted. This will be interpreted in the light of overall facts and circumstances of the case at the time of passing the judgment. Accordingly, the present application is allowed and necessary correction is made in the affidavit itself.

8. put up for final arguments on 25.07.2018.”

On behalf of the petitioner herein who is the plaintiff of the said suit CS No.10261/2016 it has been submitted that there can be no such amendment as sought by the defendant of the affidavit qua which counsel for the defendant i.e. respondent herein submits that the prayer was not to seek an amendment but only a correction of the affidavit.

Reliance is *inter alia* placed on behalf of the petitioner on the verdict of the Hon'ble High Court of Andhra Pradesh in the case of ***Mohammed Abdul Ahmad Vs. Mohammed Abdul Gafoor @ Ahmed and Another*** reported in 2012 LawSuit(AP) 606 to contend that the affidavit as filed cannot be permitted to be withdrawn inasmuch as if an affidavit forming part of the record is allowed to be withdrawn, the

very basis of marking of document on the basis thereof disappear.

During the course of submissions that have been made on behalf of the petitioner and the respondent, the counsel for either side have drawn the attention of the Court to the pleadings of the parties on the record.

It is essential to observe that vide the impugned order itself vide para-7 thereof adverted to hereinabove it has already been observed by the learned trial Court that the aspects detailed in the affidavit of the defence evidence and the averments made in the written statement wherein the claim of the plaintiff has already been admitted would be interpreted in the light of overall facts and circumstances of the case at the time of passing the judgment. It has been submitted on behalf of the petitioner that the factum that there was an admission as stated on behalf of the petitioner of the receipt of the invoice in question, the petitioner herein as plaintiff of the said suit had given during the course of the submission of the written statement before this Court in compliance of order dated 27.11.2012 when the suit bearing no. CS (OS) No.1945/2009 as it was then pending before this Court, the petitioner herein through written submissions has categorically stated in relation to the para-4 that the defendant had admitted the invoice and nowhere stated having paid the same. It has thus been submitted on behalf of the petitioner that the petitioner would be put to the great prejudice if the amendment/correction of the affidavit filed by the defence witness is allowed to be sustained in as much as the petitioner has thus not crossed examined the defendant witness in

relation to the bill having been received or not by the defendant.

On a consideration of the rival submissions, the pleadings on the record and the affidavit filed on behalf of the defendant witness, without any observations on the merits or demerits of the suit, it is considered appropriate and essential to observe that no such amendment or rectification of the affidavit of the defense witness or any witness whatsoever can be granted during the course of the proceedings and it is for the trial Court to interpret the evidence and the pleadings on the record of a case as already observed by the learned trial Court vide para-7 of the impugned order itself.

In the circumstances, the impugned order to the extent that it permits rectification/amendment of the affidavit of the defence witness vide order dated 16.05.2018 in CS No.10261/2016 is set aside.

The proceedings dated 16.05.2018 reflect that the matter is at the stage of final argument and it is so submitted on behalf of either side by the counsel present. The aspect of the averments made in the affidavit and in the pleadings of the parties would be considered by the learned trial Court at the time of final adjudication.

The petition is disposed of.

Nothing stated hereinabove shall however amount to any expression on the merits or demerits of the case.

ANU MALHOTRA, J

DECEMBER 19, 2018

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