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

% *Date of Order: 15.11.2018*

+ **CM(M) 1378/2018**

RENU SINGH Petitioner

Through: Mr. Ankit Jain, Advocate

versus

RAJIV RASTOGI & ANR Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

CM No.47109/2018 (exemption)

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

CM(M) 1378/2018, CM No.47108/2018 (stay)

3. The impugned order dated 15.10.2018 passed by the Court of learned Additional District Judge-03, South District, Saket, New Delhi ('ADJ') in Civil Suit bearing No. 7973/2016 is the subject matter of challenge in this petition filed under Article 227 of the Constitution of India.
4. By this order, an application of the respondents/defendants under Section 151 of the Code of Civil Procedure, 1908 ('CPC'), for taking on record the original Memorandum of Understanding dated 10.12.1993 and putting an exhibit thereon was allowed by the learned 'ADJ'.
5. The respondents/defendants have pleaded in their written statement about the execution of the Memorandum of Understanding dated 10.12.1993 ('MoU') executed between the erstwhile owners of the ground floor and the

owners of the first and second floor of the property in question. A photocopy of the 'MoU' was also filed along with the written statement. However, the original thereof was not produced in the examination-in-Chief of DW-3, Shri Rakesh Sharma. When DW-3 tendered his affidavit in evidence, the photocopy of the 'MoU' dated 10.12.1993 was marked as Mark DW-3/X. However, at the end of the cross-examination, the learned counsel for the defendant/respondent brought the original of the document Mark DW-3/X. The respondent/defendant moved the said application under Section 151 CPC to exhibit the 'MoU'.

6. After hearing learned counsel for the parties, the learned 'ADJ', passed the following order:

"It is well settled principle of law that mere marking of document as exhibit is no proof of a document and during the course of argument one can always take the plea of admissibility and inadmissibility. In consideration of the fact that original document has been brought by the Ld. Counsel for the defendants at the time of cross-examination of DW3, therefore in order to adjudicate the controversy on merits, the application is allowed and the original document MOU be taken on record and plaintiff will be at liberty to cross-examine DW3 on this point and since the plaintiff took objection, it can during arguments can argue on the point of admissibility."

7. The stage of production of documents is governed by the Order VIII, Rule 1-A of the 'CPC'. At this point, it would be relevant to advert to Order VIII Rule 1-A of the Code:-

"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.—(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in

support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents— (a) produced for the cross-examination of the plaintiff's witnesses, or (b) handed over to a witness merely to refresh his memory.”

8. A bare perusal of the provision indicates that all the documents upon which the defendant bases his defence or relies upon in his written statement should not only be specified in a list but also copies of the said document ought to be produced in the Court along with the written statement. The power conferred on the trial Court under Order VIII Rule 1A(3), of the ‘CPC’ is discretionary in nature to ensure that substantial justice is served. The Apex Court in a catena of cases has observed that while interpreting the provisions of the ‘CPC’, care should be taken to ensure that substantial justice is not sacrificed for hyper technical pleas based on strict adherence to procedural law. It casts an onerous duty upon the defendant to produce documents based on which the relief is claimed or is relied upon by him. It also provides an exception in a case where the defendant wants to place on

record certain documents at a later stage. In such a case, sub rule (3) stipulates that “if a document which ought to be produced in Court by the defendant and has not been produced the same shall not be accepted in evidence at the time of hearing of the suit without leave of the Court.”

9. The section, read as a whole, leads to an irresistible conclusion that if the defendants have not filed the documents which they ought to have produced in Court along with the written statement, such documents shall not be permitted to be taken on record without the leave of the Court. The discretion thus vests upon the Court either to accept the documents or not once the trial has commenced. Law with regards to discretion is well settled. The discretion should not be exercised indiscriminately or capriciously, a Court is required to visualize the facts & circumstances of the case and only if it is satisfied that non-filing of the document was, for some justifiable reason or other, beyond the control of the defendants and there was sufficient reason, or non-filing was bona fide and was not aimed to prejudice the plaintiff, pass such orders as deemed just and proper.
10. Since the execution & existence of the document has already been pleaded in the written statement by the respondent/defendant and a photocopy thereof was already annexed along with the written statement, the learned ‘ADJ’ has rightly observed that merely exhibiting the document would not tantamount to proving of a document and even the question was left open for the benefit of the petitioner to raise the arguments on the point of admissibility of the document.

11. Moreover, it would also be relevant to reproduce Section 165 of the Indian Evidence Act, 1872 (IEA) in order to better gauge the power of the Court to allow documents to be placed on record at a later stage. The section reads as under:-

“165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.”

A bare perusal of the above section is sufficient to decipher that in furtherance of justice, a judge may order the production of any document and allow it to be placed on record at any stage of the proceedings and neither party shall be entitled to enlarge it. Thus, the Ld. ‘ADJ’ was well within his power to admit the documents which were requested to be placed on record by the Respondent/defendant.

12. I do not find any illegality or infirmity in the order passed by the learned 'ADJ'. The petition is hereby dismissed along with pending application with no order as to costs.

VINOD GOEL, J.

NOVEMBER 15, 2018
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