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

+ FAO(OS) 270/2017 & CM No. 36766/2017

% Date of decision : 17th January, 2018

RAMESH CHANDER GOEL Appellant
Through : Mr. P.D. Gupta, Sr. Adv. with
Mr. Abhishek Gupta, Adv.

versus

DAYA KISHAN GOEL Respondent
Through : Mr. Manish K. Jha, Adv.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. This appeal assails an order dated 12th September, 2017 passed in CS(OS) 1239/2008 whereby the learned Single Judge has directed that even though the affidavit by way of evidence filed on behalf of the defendant is not strictly in compliance of the Joint Registrar's order dated 4th August, 2016, the evidence of the defendant be proceeded with.

2. The learned Single Judge has further directed that in case the appellant/plaintiff objects to the contents of the affidavit, the Joint Registrar shall record objections which shall be considered at the time of final disposal of the case.

3. It is submitted by learned counsels for the parties that the record, necessary for consideration of the present appeal, has been placed on record. Accordingly, with the consent of both sides, the present appeal itself is taken up for disposal.

4. The appellant herein filed a civil suit being CS(OS)No.1239/2008 against the defendant. Another suit being CS(OS) 1240/2008 was filed by the appellant against the respondent's son. These two suits have been consolidated for the purposes of trial and adjudication on the original side.

In these proceedings, the matters are at the stage of recording of defendant's evidence.

5. The defendant/respondent herein filed evidence by way of affidavit dated 25th August, 2015. In paras 6 and 9 thereof, the respondent/defendant reproduced the statement of account of Sh. Daya Kishan Goel, Neha Goel and Chirag Goel. Additionally, a statement of account of M/s Dinesh International Ltd. was extracted in para 9 of the affidavit. It is noteworthy that the respondent had been denied permission to bring these documents on record.

6. The appellant/plaintiff objected to the incorporation of the documents in the affidavit by way of evidence. This objection was accepted by the Joint Registrar by his order dated 4th August, 2016. The defendant was directed to file a fresh affidavit of evidence, which was not to contain contents of any documents which had been declined to be taken on record. It was specifically directed by this order that the affidavit filed by the defendant shall not reproduce contents of any documents. The Chamber Appeal being OA No.

190/2016 filed by the respondent, assailing this order of the Joint Registrar, was rejected by the learned Single Judge by an order dated 5th October, 2016.

7. Aggrieved thereby, the respondent herein filed FAO(OS) 297/2016 which was also rejected by the court by the order dated 10th April, 2017.

In fact, during the proceedings in the appeal, the Division Bench has noted that though the appeal deserves to be rejected, however, in view of the consent by the counsel for the plaintiff to the effect that it was agreeable to permitting the present respondent/defendant filing a fresh affidavit by way of last and final opportunity. The Division Bench granted one more opportunity to the respondent herein to file an affidavit in both the suits which would be treated as the only affidavit towards examination in chief “*provided it strictly complies with the order dated 4th August, 2016*” within one week subject to payment of costs of Rs.25,000/-.

8. In purported compliance of this order, the respondent filed an affidavit dated 15th April, 2017. This affidavit was considered by the learned Single Judge in the impugned order dated 12th September, 2017.

9. Mr. P.D. Gupta, learned Senior Counsel for the appellant has contended that this affidavit is in fact a dishonest attempt to place on record the contents of documents which have been specifically prohibited by the court and may not be taken on record. He draws our attention to the averments contained in paras 5, 6, 10 and 14. Learned Senior Counsel for the appellant as well as Mr. Manish Kr. Jha,

learned counsel appearing for the respondent have both drawn our attention to the deposition made in the earlier affidavit dated 25th August, 2015 *vis-a-vis* the deposition contained in the affidavit now filed. Learned counsel for the respondents disputes that the averments contained in paras 5, 6, 10 and 14 of new affidavit contained averments which were part of the earlier affidavit.

10. Perusal thereof manifests that in fact the defendant has consolidated the depositions made in other paras. In the paras which are objected to by the appellant, we find that the respondent has actually incorporated the very contents of the document which had been incorporated as reproductions in the previous affidavit, as statements of fact. There is therefore substance in the submission made by Mr. P.D. Gupta, learned Senior Counsel for the appellant that it is, in fact, an attempt to indirectly incorporate what has been specifically prohibited by the court which order stands upheld up to the Supreme Court of India. This is clearly impermissible.

11. Mr. Manish Kr. Jha, learned counsel for the respondent has submitted that the learned Single Judge in the impugned order dated 12th September, 2017 has effectively followed the law laid down in judicial precedents to the effect that objections with regard to the recording of evidence would deserve to be considered at the final stages. There can be no dispute to the principles laid down in the judicial precedents.

12. Learned counsel submit that he also objects to the maintainability of this appeal. However, in order to facilitate expeditious disposal of the litigation, it is submitted by Mr. Jha that

the respondent would file a fresh affidavit deleting the depositions which are really the contents of the documents which were extracted in paras 6 and 9 of the affidavit dated 25th August, 2015.

13. In view of the request made on behalf of the respondent to comport to the specific stipulations of the order dated 4th August, 2016 passed by the Joint Registrar, we need not make any observations on the objections raised or the impact judicial precedents relied upon. In fact in order to really expedite adjudication, the respondents ought to have strictly abided by the directions made by the Joint Registrar and should not have adopted this method of bringing on record what was specifically prohibited by binding judicial orders.

14. In view of the above, the order dated 12th September, 2017 is set aside and quashed. The affidavit dated 15th April, 2017 filed by the respondent/defendant on the record of CS(OS)No.1239/2008 is directed to be struck off the record.

15. The respondent shall file a fresh affidavit by way of evidence within three weeks time from today strictly abiding by the order dated 4th August, 2016.

16. The matter shall proceed for cross examination of the defendant on 23rd February, 2018, the date already fixed.

17. The present litigation emanates out of disputes between the two brothers and nephews who jointly commenced business. During the course of hearing, it appears to us that settlement by recourse to mediation is possible.

18. The appellant is represented by his son Sh. Vipin Goel in court today while the respondent is present in person. It is submitted by

both of them that they are willing to explore the possibility of a negotiated settlement by recourse to mediation without prejudice to the respective rights and contentions of the parties.

19. It is therefore directed that the respondent and Sh. Vipin Goel, son of the appellant shall appear before Ms. Veena Ralli, Mediator in the Samadhan - Delhi High Court Mediation & Conciliation Centre on 18th January, 2018 at 3 p.m. for fixation of a date for exploring the possibility of a negotiated settlement by recourse to mediation.

20. It shall be open for the mediator to join any other person in the mediation.

21. In case the appellant is unable to physically join the mediation process, he shall be joined therein by video conferencing which shall be at the cost of the appellant.

22. The settlement, if reached in mediation shall be placed on the record of the suit being CS(OS) 1239/2008 before the learned Single Judge who shall proceed in the matter in accordance with law.

23. This appeal is allowed in the above terms.

Dasti.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

JANUARY 17, 2018

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